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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1732

CITY OF CHATTANOOGA, TENNESSEE,
Petitioner,

v.

RAYMOND COX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE EASTERN DIVISION

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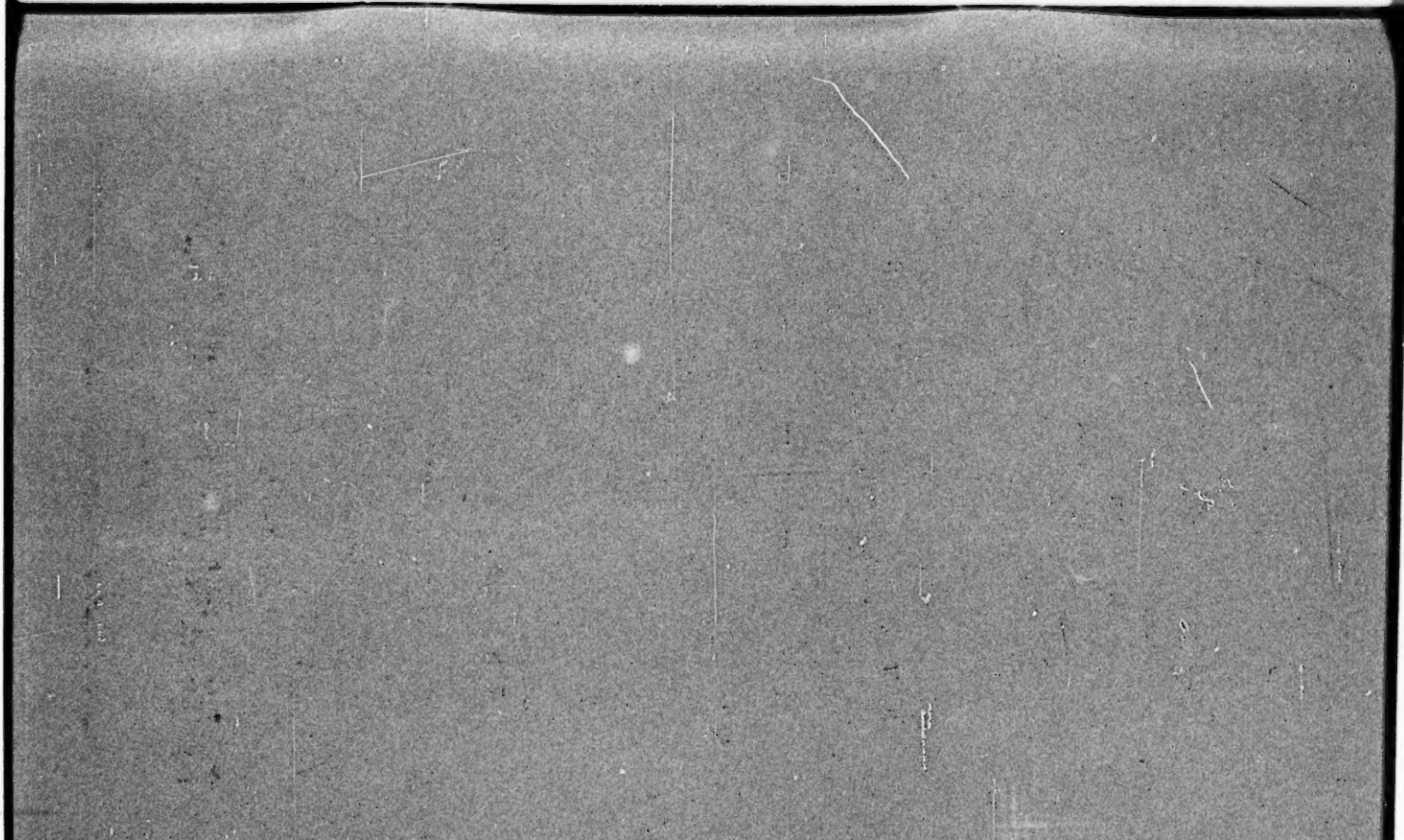

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	16
APPENDIX	17

CITATIONS

Cases:

Gardner vs. Broderick,
88 S.Ct. 1913, 392 U.S. 273 9

Garrity vs. State of New Jersey,
87 S.Ct. 616, 385 U.S. 493 7

Kastigar vs. United States,
92 S.Ct. 1653 12

Slochower vs. Board of Higher Education of the City of New York,
76 S.Ct. 637, 350 U.S. 551 6

Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York,
88 S.Ct. 1917 10

Zicarelli vs. New Jersey State Commission of Investigation,
92 S.Ct. 1670 13

Constitution of the United States:

Fifth Amendment 4
14th Amendment 5

Miscellaneous:

Tennessee Law Review, Vol. 39, No. 2 13

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OPINION BELOW

The unreported opinion of the Court of Appeals of Tennessee, Eastern Division, was entered and filed on July 18, 1973. The Supreme Court of Tennessee denied a petition for certiorari in this case in an order filed February 19, 1974. A copy of the opinion of the Court of Appeals is appended to this Brief. The Chancellor's Memorandum Opinion in the trial court is appended to the petition for certiorari filed on behalf of City of Chattanooga, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Does an employee of a municipal corporation have the right to invoke the protection of the Fifth Amendment of the United States Constitution and if said individual does invoke the Fifth Amendment does the municipality have the right to discharge him without violating the Due Process clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States as it is applied to the States through the Fourteenth Amendment is involved in this matter.

STATEMENT OF THE CASE

The respondent, Raymond Cox, is a Captain in the Chattanooga Fire Department and has been employed in that department over seventeen (17) years. On April 4, 1972, Detectives Gaston and Rominger of the Chattanooga Police Department were conducting an investigation of a murder which occurred on March 11, 1972. They had received a name of a suspect, Harry Brooks Daniels, who had been arrested in Atlanta, Georgia. Harry Brooks Daniels was arrested in Atlanta, Georgia, and in his possession was found an address book which contained the name of Ray Cox, and two telephone numbers of the Respondent. Said telephone numbers were his home address and also a number at the firehall where he was presently stationed. (Tr. 21). On April 4, 1972, Detectives Rominger

and Gaston went to Respondent's home and requested that he accompany them to the Chattanooga Police Department for questioning. The Respondent lives in East Ridge, Tennessee, and was therefore not required to accompany the officers, as they had no authority to require him to do so. However, he went with them voluntarily, and it is further testified to by all of the officials of the Chattanooga Police Department that he was at all times courteous with them. The Respondent was brought to headquarters for the purpose of showing him some pictures of Harry Brooks Daniels, and determining the relationship between him and Harry Brooks Daniels. (Tr. 23). Upon arrival at Detective office of the Organized Crime Division of the Chattanooga Police Department, ***the Respondent was advised of his constitutional rights and asked to sign a "rights waiver" which he refused.*** The right's form which the Respondent was requested to sign is attached as Exhibit Three (Tr. 103) to the original transcript and is commonly known as the Miranda Form. The Respondent refused to sign said form and requested that he be allowed to talk to an attorney. Commissioner Gene Roberts was summoned to the Detective Office and informed the Respondent that unless he cooperated with the officers that if the City Attorney approved of his action, he would fire the Respondent. The Respondent requested the presence of his attorney and upon his attorney's arriving on the premises, a private discussion was conducted between the Respondent and his present counsel, Jerry H. Summers. Acting upon the advice of counsel, the Respondent continued to refuse to answer the questions and since there were no charges pending against him, he was allowed to leave. On April 5, 1972, Commissioner Roberts sent a letter to the Respondent which stated as follows:

> "This is to advise you that effective at the end of your working day this date your employment with the Chattanooga Fire Department is terminated.

> "You are being dismissed for insubordination, for conduct unbecoming a member of the fire-fighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

(Exhibit 1, Tr. 101). On April 12, 1972, the Respondent forwarded a letter to Commissioner Gene Roberts (Exhibit 2, Tr. 102) requesting a hearing before the entire City Commission. On June 25, 1972, a hearing was held before the entire City Commission with Commissioner Roberts excusing himself from voting, and a full hearing was held in this matter. Following the hearing of testimony, the Respondent was discharged from the Chattanooga Fire Department by unanimous vote. Subsequent thereto, the Respondent filed a Writ of Certiorari in the Chancery Court of Hamilton County, Tennessee, asking for a trial de novo on the hearing below. The Court sustained Respondent's Motion for Summary Judgment and held that he had been wrongfully discharged in violation of his Fifth Amendment Rights. The ruling of the Trial Court was subsequently upheld by the Court of Appeals of Tennessee, Eastern Division, and the Tennessee Supreme Court.

ARGUMENT

The Respondent respectfully submits that under the case law of this country at the present time, he is entitled to the protection of the Fifth Amendment and Fourteenth Amendment and that the City of Chattanooga has no basis for wrongfully discharging him upon his seeking the protection of the Fifth and Fourteenth Amendments on advice of counsel.

The Fifth Amendment to the United States Constitution was enacted in 1791 and reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself***, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." (Emphasis added)

The Fourteenth Amendment to the United States Constitution reads as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the United States has been confronted with the legal question involved in this matter on several occasions in the past few years. In order to possibly clarify the contentions of the Respondent in this brief, six (6) leading cases will be cited for the consideration of the Court, those cases are:

Slochower vs. Board of Higher Education of the City of New York, 76 S.Ct. 637, 350 U.S. 551
Garrity vs. State of New Jersey, 87 S.Ct. 616, 385 U.S. 493

Gardner vs. Broderick, 88 S.Ct., 1913, 392 U.S. 273
Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York, 88 S.Ct., 1917
Kastigar vs. United States, 92 S.Ct. 1653
Zicarelli vs. New Jersey State Commission of Investigation, 92 S.Ct. 1670.

In *Slochower vs. Board of Higher Education of the City of New York*, a professor with twenty-seven years teaching experience was discharged from his position as associate professor of Boston College, an institution maintained by the City of New York, because he invoked the privileges against self-incrimination when he appeared before the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate in New York City. The investigation, conducted on a national scale, related to subversive influence in the American Education System. Professor Slochower, when called to testify, stated that he is not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. But he refused to answer questions concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. The chairman of the Senate Subcommittee accepted Slochower's claim as a valid assertion of an admitted constitutional right. Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the college and that he was fired from his job. He appealed the ruling to the State's courts, and this matter reached the United States Supreme Court which held that the school board had acted improperly in discharging Professor Slochower for asserting his rights under the Fifth Amendment. He argued, as does the

respondent, *that the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment.* The Court, in reversing the suspension, said:

> *"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as one of the most valuable prerogatives of the citizen. Brown vs. Walker*, 161 U.S. 591, 610 S.Ct. 644, 652, 40 L.Ed. 819. We have affirmed our faith in this principle recently in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964. In *Ullmann v. United States*, 340 U.S. 422, 76 S.Ct. 497, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The 1967 Supreme Court decision of *Garrity vs. State of New Jersey*, involved police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a

report to the Court. The matters investigated concerned alleged "*fixing of traffic tickets.*"

Before being questioned, each police officer was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer, he would be subject to removal from office. The police officers answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over the defendant's objections, *some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws.* The police officers were convicted and their convictions were sustained over their protests that their statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department. The Court in reversing the convictions of the police officers, said:

> "The choice imposed upon petitioners was one between self-incrimination or job forfeiture. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . we conclude that policemen, like teachers and lawyers, are not relegated to watered-down version of constitutional rights . . . there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . we now hold the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, that it extends to all, whether they are policemen or other members of our body politic."

In *Gardner vs. Broderick*, a policeman brought this action in the Supreme Court of the State of New York seeking reinstatement as a New York patrolman and back pay. He claimed he was unlawfully dismissed because he refused to waive his privilege against self-incrimination. In August 1965, pursuant to a subpoena, appellant appeared before a New York County Grand Jury which was investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations. He was advised that the Grand Jury proposed to examine him concerning the performance of his official duties. He was advised of his privileges against self-incrimination, *but he was asked to sign a waiver of immunity after being told he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for his refusal.* The question presented in that case was whether a policeman who refused to waive the protection which the privilege gives him under the Fifth Amendment may be dismissed from office because of that refusal. The United States reversed the discharge of the policeman and said:

> "here, petitioner was summoned to testify before a Grand Jury in an investigation of an alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination . . . he was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege . . . petitioner could not have assumed and certainly he was not required to assume, that he was being asked to do an idle act of no legal effect. In any event the mandate of the great privilege against self-incrimination does not tolerate

the attempt regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded before the Grand Jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel the petitioner to waive his immunity."

The companion case to the *Gardner* case is the *Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York* which was decided in 1968 at the same time of the *Gardner* case. This case involved the discharge of members of the Department of Sanitation of New York City. In 1966, the Commissioner of Investigation of New York City began an investigation of charges that employees of the Department of Sanitation were not charging private cartmen proper fees for use of certain city facilities and were diverting to themselves the proceeds of fees that they did charge. Later that year, each of the petitioners were summoned before the Commissioner. *Each was advised that if he refused to testify with respect to his official conduct or that of any other city employee on the grounds of self-incrimination, his employment and eligibility for any other city employment would terminate. Twelve of the petitioners, asserting the constitutional privilege against self-incrimination refused to testify. After the disciplinary hearing they were discharged by the Commissioner of Sanitation on the explicit ground that they had refused to testify.* Three of the petitioners answered the questions put to them, denying the charges made. They were thereafter suspended by the Commissioner of Sanitation on the basis of information received from the Commissioner of Investigation

concerning irregularities arising out of their employment in the Department of Sanitation. Subsequently, they were summoned before a Grand Jury and asked to sign waivers of immunity, they refused. Administrative hearings were held and they were dismissed from employment on the sole ground that they had refused to sign waivers of immunity. The Supreme Court, in reversing their discharge, held:

> "Petitioners were not discharged merely for the refusal to account for their conduct as employees of the City. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privileges. Three were asked to sign waivers of immunity before the Grand Jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on the basis . . . as we stated in *Gardner vs. Broderick, if New York had demanded the petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.* But here the precise and plain impact of the proceedings against petitioners was to present them with a choice between surrendering their constitutional rights or their jobs.

Petitioners, as public employees, are entitled, like all other persons, to the benefits of the Constitution including the privilege against self-incrimination. *At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which did not involve an attempt to coerce them to relinquish their Constitutional rights.*"

In *Kastigar vs. United States*, 92 S.Ct. 1653, the petitioners were ordered to appear before the Grand Jury and to answer questions under a grant of immunity and on their refusal to answer questions, after asserting their privilege against compulsory self-incrimination, they were adjudged in civil contempt and fined. The Supreme Court, in an opinion by Mr. Justice Powell, held that although a grant of immunity must afford protection commensurate with that afforded by the privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is co-extensive with the scope of the privilege and is sufficient to compel testimony over the claim of privilege. The Court also held that in any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony.

In *Kastigar*, the Court states:

"That the power to compel testimony is not absolute. There are a number of exemptions from the testimony of duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important ad-

vance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence which might be so used. The Court has been zealous to safeguard the values which underlie the privilege.

The *Kastigar* decision was primarily concerned with the question of requiring a witness to testify under a Federal immunity statute. It should be noted that in the principal case no effort was made by the Chattanooga Police Department to discuss the question of immunity, and there is no immunity statute or ordinance under the law in the State of Tennessee or the City of Chattanooga which could be used to grant the Respondent immunity and require him to testify over his Fifth Amendment privilege.

Zicarelli vs. New Jersey State Commission of Investigation, 92 S.Ct. 1670, is a companion case of *Kastigar*, and was also decided in May of 1972. Mr. Justice Powell also rendered the opinion in this case, and the facts are very similar to the *Kastigar* decision. *Zicarelli* also involves an individual who was being questioned regarding criminal activities, and he invoked the Fifth Amendment privilege. Subsequently, the defendant was granted statutory immunity, but refused to testify, basing his decision on the scope of immunity granted. The Court reached the same decision as in *Kastigar* and affirmed the contempt conviction and cited the same reasons as given in *Kastigar*.

The *Tennessee Law Review*, in Volume 39, Number 2, Winter Edition 1972, has a very lengthy and detailed article entitled "The Self-Incrimination Clause and Administrative Law".

The author, in reference to *Slochower vs. Board of Education, supra*, stated:

> "Where the administrative sanction is in the form of a retraction of some benefit or status already conferred, it is a denial of due process of law to impose it solely as a penalty for legitimately invoking a privilege. This is more clear to the case where the benefit or status taken away has no relation to the proceedings in which the claim was asserted."

The author, in commenting on the decision in *Gardner vs. Broderick, supra*, cites Mr. Justice Fortas's opinion:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal.

Going further, the author states:

> "This statement is consistent with other holdings of the court that public employees claiming the privilege may be discharged for 'insubordination,' 'doubtful trust and reliability,' and 'incompetence' providing the sanction is actually based on such grounds rather than the assertion of constitutional right."

The last statement in the *Tennessee Law Review* expresses very clearly the position of the Respondent in the principal case. There is no question that the purpose of questioning the Respondent was to determine the relationship between Raymond Cox and Harry Brooks Daniels, the suspect in the offense being investigated. (Tr. 23). The City's attorney attempts to get around the question of requiring

the Respondent to sign the Miranda rights form by continuously stating that the Respondent was not asked to sign a waiver of immunity from prosecution at any time. The rights provided under the Miranda form are, in fact, asking the Respondent to freely and voluntarily make statements which might possibly be used to incriminate him.

Detective Gaston on page 34 of the transcript made the following statements which are particularly pertinent to the legal issue involved in this matter:

"Q Now, any information which you elicited from this man that you thought was appropriate, you were going to use it in the case, is that not correct?

"A If it was pertinent to the case, of course.

"Q And any information that you may have received from him, if it would in any way implicate him, you would use it in the case, would you not?

"A Of course."

The facts of the principal case are completely in line with all of the decisions cited in the afore-styled paragraph. The Respondent was questioned by Detective Rominger and Gaston of the Chattanooga Police Department, and upon being requested to sign a waiver of his constitutional rights against self-incrimination, requested an attorney. He was informed by Commissioner Roberts that if he did not sign the rights form and cooperate with the detectives in the investigation being conducted by them, he would be discharged from his position as a Captain in the Chattanooga Fire Department. Respondent chose to assert his constitutional right under the Fifth Amendment upon advice of counsel and was subsequently discharged by a letter addressed to him through the United States Mail from Commissioner Roberts the following day.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review on a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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(615) 265-2385,

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APPENDIX

[fol. 1]

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

RAYMOND COX *Appellee* *vs.* CITY OF CHATTANOOGA, ET AL *Appellants*	FROM THE CHANCERY COURT FOR HAMILTON COUNTY HON. RAY L. BROCK, JR., CHANCELLOR AFFIRMED

EUGENE N. COLLINS, City Attorney, and RANDALL L. NELSON, Special Counsel, FOR APPELLANTS

JERRY H. SUMMERS OF CHATTANOOGA FOR APPELLEE

OPINION

Parrott, J.

The Board of Commissioners of the City of Chattanooga has appealed from the Chancellor's order reinstating fire captain Raymond Cox whose dismissal for insubordination and conduct unbecoming the fire-fighting service was unanimously affirmed by the Board.

The Chattanooga Police Department was conducting an investigation of a murder which occurred in that city on

March 11, 1972. Harry Brooks Daniels, a suspect of the murder, was arrested in Atlanta, Georgia. On his person was found an address book which contained the name of Raymond Cox, his home telephone number and the two telephone numbers of the precinct station where Captain Cox worked. Two city detectives went to the Cox home and requested he accompany them to the Chattanooga Police Department for questioning. Captain Cox voluntarily rode to the headquarters where the police presented the following form which Captain Cox refused to sign:

[fol. 2] YOUR CONSTITUTIONAL RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am

doing. No promises or threats have been made to me and no pressure, force or coercion of any kind has been used against me.

Signed _____
(refused)

Commissioner of the Fire and Police Departments of the City of Chattanooga, Gene Roberts, came into the headquarters and informed Captain Cox that if he did not cooperate with the officers in this investigation, that if the city attorney approved, he [Commissioner Roberts] would fire him.

Captain Cox requested to see an attorney. Upon his attorney's arrival at the headquarters and after a private discussion between Cox and his attorney, Cox again refused to answer any questions or look at any of the pictures offered by the investigating officers.

On the next day Commissioner Roberts sent a letter to Captain Cox which stated the following:

"This is to advise you that effective at the end of your working day this date your employment with the Chattanooga Fire Department is terminated.

"You are being dismissed for insubordination,
[fol. 3] for conduct unbecoming a member of the fire-fighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

Captain Cox asked for and was granted a hearing before the full Board of Commissioners of the City of Chattanooga. This hearing was held on June 25, 1972, and by unanimous vote the Board affirmed the dismissal of Captain Cox.

Thereafter Captain Cox, by petition for certiorari, asked for a review of the Board's action by the chancery court. In the chancery hearing, after hearing proof on a motion for summary judgment, the chancellor entered a decree holding Captain Cox had a right to remain silent under the Fifth Amendment and his discharge was a violation of his constitutional rights. The chancellor's decree ordered Captain Cox reinstated with full pay.

From this decree the City has appealed asking for a reversal of the chancellor's order.

There are numerous cases involving municipal and public employees' dismissals under the threat of loss of employment. *Slochower v. Board of Higher Education of the City of New York*, 76 S.Ct. 637, 350 U.S. 551; *Garrity v. State of New Jersey*, 87 S.Ct. 616, 385 U.S. 493; *Gardner v. Broderick*, 88 S.Ct. 1913, 392 U.S. 273; *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 88 S.Ct. 1917; *Kastigar v. United States*, 92 S.Ct. 1653; *Zicarelli v. New Jersey State Commission of Investigation*, 92 S.Ct. 1670.

As we all know, the Fifth Amendment to the United States Constitution provides that no one shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without the due process of law.

[fol. 4] Our United States Supreme Court has held this constitutional right to be one of the most valuable prerogatives of a citizen and there shall not be imputed any sinister meaning by one's exercise of the right. *Brown v. Walker*, 161 U.S. 591, 610 S.Ct. 644; 40 L.Ed. 819.

Also our Supreme Court has held that the free choice to speak out or remain silent is extended to all. In *Garrity v. State of New Jersey, supra*, the Court said:

". . . we conclude that policemen, like teachers and lawyers, are not relegated to watered-down version of constitutional rights . . . there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . we now hold the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, that it extends to all, whether they are policemen or other members of our body politic."

The chancellor in his order of reinstatement of Captain Cox cited and heavily relied upon the decision by the United States Supreme Court in *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York* (1968), 88 S.Ct. 1917, where it was said:

"Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the Grand Jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on this basis. Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d

562 (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of the witness, had not been decided when these 12 petitioners were put to their hazardous choice. In any event, we need not decide whether these petitioners would have effectively waived this constitutional protection if they had testified following the warning that their testimony could be used against them. They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips
[fol. 5] which, despite the constitutional prohibition could be used to prosecute them criminally.

"As we stated in Gardner v. Broderick, supra, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. Gardner v. Broderick, supra; Garrity v. State of New Jersey, supra. Cf. Murphy v. Waterfront Commission, 378 U.S. 52, at 79, 84 S.Ct. 1594, 1607, at 1609, 12 L.Ed.2d 678

(1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

It is apparent from the above, a public employee may be discharged for failing to give an account to his superiors for matters directly relating to the performance of his official duties but not to matters outside the scope of his duties. See *Slochower v. Board of Higher Education of the City of New York*, *supra*; *Gardner v. Broderick*, *supra*.

In this case there is no claim or contention the investigation of the murder was in any way related to or within the scope of duties of Captain Cox. Thus, as distasteful as it may be to some, Captain Cox had the constitutional right under the Fifth Amendment to remain silent. His discharge from his employment, as found by the chancellor, is illegal and in violation of his rights under the Constitution. Accordingly, the decree is affirmed with costs taxed to the appellant.

James W. Parrott, J.

CONCUR:

Robert E. Cooper, P.J.(E.S.)

Clifford E. Sanders, J.